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IN THE

Supreme Court of the United States.

308142
Sup Ct.

OCTOBER TERM, 1952.

No. ~~670~~ 24

IN THE MATTER OF THE FLORIDA EAST COAST RAILWAY CO.,

Debtor,

ST. JOE PAPER CO., a corporation, and JESSIE BALL DUPONT, ELBERT DENT, EDWARD BALL and THE FLORIDA NATIONAL BANK OF JACKSONVILLE, as Testamentary Trustees of the Trust Estate created by the Last Will and Testament of Alfred I. duPont, RAILWAY LABOR EXECUTIVES ASSOCIATION, SEABOARD AIR LINE RAILWAY COMPANY, SOUTHERN RAILWAY SYSTEM and F. K. CONN,

Petitioners,

VS.

THE ATLANTIC COAST LINE RAILROAD CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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No. .

IN THE MATTER OF THE FLORIDA EAST COAST RAILWAY CO.,

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ST. JOE PAPER CO., a corporation, and JESSIE BALL DUPONT, ELBERT DENT, EDWARD BALL and THE FLORIDA NATIONAL BANK OF JACKSONVILLE, as Testamentary Trustees of the Trust Estate created by the Last Will and Testament of Alfred I. duPont, RAILWAY LABOR EXECUTIVES ASSOCIATION, SEABOARD AIR LINE RAILWAY COMPANY, SOUTHERN RAILWAY SYSTEM and F. K. CONN,

Petitioners,

VS.

THE ATLANTIC COAST LINE RAILROAD CO.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

PETITION.

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of

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Appeals for the Fifth Circuit, entered in this cause (R. Vol. II,* p. 717).

Questions Presented.

I. It being clear that Section 77 of the Bankruptcy Act, as enacted in 1933, did not authorize the Interstate Commerce Commission to present a plan of reorganization of a railroad involving a "forced" merger of the debtor Railway with another railroad, the question is whether amendments to the 1933 Act, made in 1935, do authorize forced mergers.

The Act of 1933 for railroad reorganizations in bankruptcy contained in subdivision (b) a so called consistency clause which qualified the powers of the Commission in respect of mergers, by expressly providing that a merger would have to be brought about by compliance with *"provisions"* of the Interstate Commerce Act which allowed mergers *only* if requested and agreed to by the carrier and then approved by the Commission, after notice to the Governors of the states, and after hearing communities and shippers served by the carriers. This "consistency" provision in this legislation was repeated in subd. (e) of the 1933 Act, where it was said that transfers of property or consolidations or mergers may be made "to the extent contemplated by the plan *consistent with the purposes* of the Interstate Commerce Act as amended". It will be noted that the clause in (b) used the word "provisions" and the clause in (e) used the word "purposes". By amendments in 1935

* Roman numerals in parentheses indicate Record Volume. Volumes IV, V and VI are the record on the first appeal (1949) which by stipulation were made part of the record on the second appeal.

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these two "consistency" clauses were consolidated and transplanted from (b) and (e) to subdivision (f).

In the 1935 Act, subd. (.), the clause allowing transfer and mergers had the qualification "to the extent contemplated by the plan" and "not inconsistent with the provisions and purposes of Chapter 1 of Title 49 as on August 27, 1935 or thereafter amended."

The narrow question is therefore whether the mere transfer of the "consistency" clauses from subdivisions (b) and (e) to subdivision (f) altered the meaning of the clauses and gave to the Interstate Commerce Commission a power to force mergers, which was withheld from it under the Act of 1933.

II. The second question is whether the findings of Judge Strum that the plan was unfair and inequitable were so "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure as to justify the Court of Appeals in setting them aside, and therefore whether the "cram down" provision of the 1935 Act, intended only to overcome the dissents of obstructive minorities, should be applied by the courts against the protests of 99% of the security holders who are the equitable owners of the debtor's property.

The Court of Appeals erred

I. In construing Section 77 of the Bankruptcy Act as amended in 1935 to grant the Interstate Commerce Commission power to propose and certify a plan of reorganization involving a consolidation or merger

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of the Florida East Coast Railway Company with the Atlantic Coast Line, to which the Florida East Coast Railway had not agreed, and in approving such a plan over the objection and protest of 99% of the equitable owners of the Florida East Coast Railway.

II. In setting aside as "clearly erroneous" the findings of the District Court that the plan was unjust and inequitable.

Reasons for Granting the Writ.

The Court of Appeals has decided these two important questions of federal law which have not been, but should be, settled by this Court. The Interstate Commerce Commission is sharply divided.

Of the seven Circuit Judges who have passed on this case four, Judges Sibley, Russell, Strum and Borah disagree with the result arrived at, and three, Judges Hutcheson, Holmes and Rives take the other view.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the District Court (R. Vol. I, p. 127) is reported in 103 Fed. Supp. 825.

The opinion of the Court of Appeals (R. Vol. II, p. 717) is reported in 201 Fed. 2nd 325.

Jurisdiction.

The judgment of the Court of Appeals was entered January 19, 1953.

Jurisdiction to issue the writ rests on Title 28, United States Code, §1254.

I.

Statement.

The main lines of the Florida East Coast Railway extend from Jacksonville to a point a little south of Miami. At Jacksonville it interchanges freight and passengers with the Southern Railway, the Seaboard and the Atlantic Coast Line. It has always been completely independent. None of those other three lines has owned any of its securities. It operated under an equity receivership in the United States District Court for the Southern District of Florida from August 31, 1931, until January 25, 1941, when

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a reorganization proceeding was instituted under Section 77 of the Bankruptcy Act. Several plans of reorganization have been proposed by the Interstate Commerce Commission. The first and third were rejected by the District Court. The second was in effect withdrawn by the Commission.

In its earlier action the Interstate Commerce Commission proposed plans for "internal" reorganization. In November 1944 a suggestion was first made to the Commission to certify a plan which would involve transfer of the properties of the Florida East Coast Railway to Atlantic Coast Line. This proposal was unanimously rejected by the Commission (261 I. C. C. 151). It pointed out (p. 191) that the Atlantic Coast Line had operated in the red in 1932, 1933, 1934, 1935 and 1938. It pointed out that a merger would result in an increase in the fixed charges of the Coast Line. It said (p. 191) "in our opinion the guaranties by the Coast might, during a depression of any considerable duration, contribute towards precipitating bankruptcy proceedings for both carriers even taking into consideration the possibility that certain economies might result from a common operation of the two lines. While we have expressed a conviction that consolidations of railroads under certain conditions are desirable in the public interest, the effect should be of reducing rather than increasing the fixed charges of the carriers involved."

The case of the Soo Line reorganization, 252 I. C. C. 525, was cited to the Commission as authority for the claim that the Commission had authority to compel a merger between the Soo Line and the Canadian Pacific by giving the Canadian Pacific Railroad an

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option to acquire stock in the Soo Line. Of that the Commission said:

> "In that case, however, the Canadian Pacific had controlled the debtor for a great number of years, was itself a large creditor of the debtor and there was general agreement among the creditors upon the necessity for the sale and the price to be paid for the stock. The parties to the proceeding in that case were generally agreed that a continued control by the Canadian Pacific Railroad of the debtor was vital to its existence and we so found. No similar situation is presented in the present procedure. The sale of stock would be required in the face of aggressive opposition from the holders of a majority in principal amount of the first and refunding bonds, which also states in its brief that in the event the plan is approved it will vote to reject it" (261 I. C. C. 192).

This indicated that at that time (January 1945) the Interstate Commerce Commission was not persuaded that it had power to force a merger, without the consent of the equitable owners of the Florida East Coast.

The Coast Line never had any control over the Florida East Coast or any ownership of its securities. It intervened with the consent of the Interstate Commerce Commission and has since purchased for $5,000 $1,900,000 of unsecured claims against the Florida East Coast, the holders of which have no interest in the mortgaged property though they may have an interest in some free assets. See Judge Strum's opinion (par. 7, R. Vol. I, p. 133, and footnote). There is a first mortgage, originally for $12,000,000 now reduced to $8,189,000, by purchases by the trustees

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in bankruptcy for the account of the first and refunding bondholders, on the Florida East Coast, which is not in default, and the Florida East Coast has in its recent operations amassed more than enough money to pay the first mortgage in full. There is another mortgage to secure an issue of the 5% first and refunding bonds, the principal of which is $45,000,000 and the accumulated and defaulted interest on which is $35,000,000. The Commission found that the stock is worthless (267 I. C. C. 383) and that the holders of these bonds are the equitable owners of the mortgaged property (282 I. C. C. 165, 186).

A plan by the Commission, overruling the report of its Examiner, adopted by its vote of six to five, which plan included a merger with the Atlantic Coast Line, was considered in 1949 by Circuit Judge Sibley, sitting in the District Court (81 F. Supp. 926). He considered whether the Interstate Commerce Commission had statutory power to make and certify a plan involving a forced merger, and also whether the plan was fair and equitable. On the question of power he said:

> "I do not think Congress intended to force a merger undesired by the majority in amount of the affected parties by permitting a merger to be part of a plan. This conclusion makes it unnecessary to determine whether the court's power in bankruptcy could be extended to force a merger consistently with the Fifth Amendment. It also ends this plan. But I am assured in argument that the decision if made either way will be appealed, so it will be useful to decide the merits of the plan, if it is hereafter held that a forced merger is lawful" (p. 932, 81 F. Supp.).

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He then went on to hold the plan not fair and equitable, and that "the objectors are reasonably justified in objecting and not mere obstructors", as only "$572,400 of the first and refunding bonds out of $45,000,000 say they will probably accept". He then discussed the facts at length and disapproved the plan, and referred the case back to the Commission.

From Judge Sibley's decision an appeal was taken by the Atlantic Coast Line and others to the Court of Appeals of the Fifth Circuit (179 F. 2d 538). The Court of Appeals, in an opinion by Judge Hutcheson, affirmed Judge Sibley's judgment holding the plan unfair and unreasonable. Judge Hutcheson said:

> "The case we have here is that of one railroad company coveting, and pressing to possess, a competing debtor railroad company, against the wishes of 98 percent of the equitable owners of the debtor and over their violent objections, that consummation of the plan will result in depriving them of their property without just compensation. In pressing these objections, some of the bondholders contend that an internal reorganization would better protect their interests, while all of them insist that questions of internal reorganization, as opposed to a forced merger, aside, the amount the covetous one agrees to pay for the forced expropriation is neither fair nor equitable" (p. 542, 179 F. 2d).

Judge Hutcheson also said "the opposition to a plan of all those interested in the debtor would normally make the plan *prima facie* suspect" (p. 544).

He said he thought the Commission had statutory power to force a merger and in remanding the case for a new plan said it was without prejudice to "in-

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cluding such a plan providing for a merger with, or sale to, the Coast Line" (p. 544).

Judge Russell concurred in affirming the judgment of Judge Sibley, but said he was in "complete accord" with the conclusions expressed in Judge Sibley's opinion, and could not accept contrary views expressed by Judge Hutcheson. In this way he concurred in Judge Sibley's view that Congress had not given the Commission power to submit and certify a plan to force a merger.

Judge Holmes dissented and voted to reverse Judge Sibley.

This Court denied a petition for certiorari by the Atlantic Coast Line April 3, 1950. *Atlantic Coast Line* v. *St. Joe Paper Co.* (339 U. S. 929). The questions of power raised by the present petition were not raised by that petition and could not have been raised by the present petitioners at that stage since they had prevailed in the Court below. Later, the Interstate Commerce Commission approved another plan, the one now before this Court, providing for the forced transfer of the property of the Florida East Coast to the Atlantic Coast Line.

That plan came before Circuit Judge Strum, sitting in the District Court. The question of statutory power he did not deal with, as he appeared to be bound by the view of Judges Hutcheson and Holmes on that point. He disapproved the plan as unfair and inequitable. His findings are fully set forth in his opinion (R. Vol. I, p. 127). The plan would require that all the property of the Florida East Coast be transferred to the Atlantic Coast Line and the present equitable owners of the Florida East Coast

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accept securities of the Atlantic Coast Line and a little cash in payment. For each $1,000 bond of the Florida East Coast a holder would receive cash and Atlantic Coast Line securities at their *par* value. The difference between what the holder of a $1,000 bond of the Florida East Coast would have received from Atlantic Coast Line under the rejected third plan and what he would receive under the present fourth plan is suggested by the following table:

	3rd Plan	4th Plan
Cash	$ 91.67	$ 84.69
ACL Divisional fixed interest First Mortgage bonds	$ 300.00	$ 300.00
ACL Divisional Junior Income bonds	$ 175.00	$ 300.00
ACL Preferred Stock	$ 200.00	$ 200.00
ACL Common Stock	$ 133.33	$ 133.33
Total Par Value	$ 900.00	$1,018.02

The only apparent difference between the present distribution and the one that Judge Hutcheson held unfair and inequitable on the first appeal is that the present plan provides $6.98 *less* cash and $125 more in *par* value of ACL Divisional Junior Income bonds for each Florida East Coast bondholder.

There is not enough difference on the face of the two distributions to justify the approval of the last plan after disapproval of the third, even if the two plans were comparable without any adjustments. But to make the two plans properly comparable, several adjustments must be made to take into account actual differences in the tangible and intangible property involved in the two plans. Judge Strum made a few of those adjustments in a part of his careful opinion, where he dealt with the fairness of the plan. After making them, he found the bondholders will receive

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under the last plan far less than under the rejected third plan (R. Vol. I, pp. 153-154, par. 7).

The St. Joe Paper Co. and the Trustees of the trust created by the will of Alfred I. duPont hold about $25,000,000 of these bonds. The remaining $20,000,000 are held by various other groups who have appeared; all are opposed to this plan. The Bank of the Manhattan Company, trustee under the mortgage securing the refunding bonds, also objects to the plan. Seaboard and Southern Railways object to the plan on the ground that control by the Atlantic Coast Line of Florida East Coast Line would enable Atlantic Coast Line to divert to itself much of the traffic now interchanged at Jacksonville by Florida East Coast with Southern and Seaboard and hence would stifle competition of the three trunk lines for this Florida East Coast interchange. Objection is also made by Railway Labor Executives Association, representing the Florida East Coast employees, who are disturbed because the Commission in predicting saving in operation costs through the merger suggests the discharge of 319 employees. The record also shows that testimony was taken in Florida for two weeks, at which many Florida communities and shippers favored internal reorganization and opposed the proposal to turn the Florida East Coast Line over to the Atlantic Coast Line. F. K. Conn is a bondholder.

Commissioner Mahaffie, writing for the minority of the Commission, said:

> "The trustee under the debtor's first and refunding mortgage, securing the only bonds which would be seriously affected under the plan, all bondholders appearing before us, the employees of the debtor, and a great predominance of the rep-

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resentatives of shippers and other local interests who appeared, favor an internal reorganization. In general those interests as well as other carriers serving the territory, oppose the plan for a merger. This is persuasive that the public interest will best be served by approval of a plan providing for an internal reorganization."*

The principal question of law involved is whether the Interstate Commerce Commission has statutory power to propose and certify a plan for a merger of these two railways, without the consent of the Florida East Coast. Ninety-nine per cent of the first and refunding bondholders of the Florida East Coast oppose the merger, and contend that the Interstate Commerce Commission has not power to force it upon them.

The Statutes.

Subdivision (b) of Section 77 of the Act of 1933, amending the Bankruptcy Act so as to apply to reorganization of railroads, was as follows:

"(b) A plan of reorganization within the meaning of this section * * * (3) shall provide adequate means for the execution of the plan, which may, *so far as may be consistent with the provisions of sections 1 and 5 of Title 49,* include the transfer or conveyance of all or any part of the property of the debtor to another corporation or to other corporations or the consolidation of the properties of the debtor with those of another railroad corporation, or the merger of the debtor with any other railroad corporation. * * *."

* 282 I. C. C. 81, 191.

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The part in italics has for convenience been called the "consistency clause".

A similar clause was placed in subdivision (e) of the 1933 Act, which read as follows:

> "Upon the acceptance of the plan in accordance with this subdivision (e), the Commission may without further proceedings grant authority for * * * transfer of any property or consolidation or merger of properties to the extent contemplated by the plan *consistent with the purposes of the Interstate Commerce Act as amended.*" (Italics supplied.)

It will be noted that the clause in (b) required consistency with the "*provisions*" of the Interstate Commerce Act, while the clause in (e) spoke of the "*purposes*" of the Interstate Commerce Act. In 1935 when the bill for amendments was under consideration, the clauses in (b) and (e) were consolidated and transposed from (b) and (e) to (f), where it reads as follows: "Upon the confirmation of a plan the Commission shall without further proceedings grant authority for the * * * transfer of any property, sale, consolidation or merger of the debtor's property * * * to the extent contemplated by the plan *and not inconsistent with the provisions and purposes of Chapter 1 of Title 49,* as on August 27, 1935 or thereafter amended," thus using both the words "provisions" and "purposes" with the obvious intention of making the consistency clause being transposed to (f) as broad as it had been in the 1933 Act.

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Sections 1 and 5 of Title 49 were part of the Interstate Commerce Act regulating unifications, mergers and acquisitions of control of railroads. Subdivision (2) of Section 5 was as follows:

"(2) *Unifications, mergers, and acquisitions of control.*

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this section—

(1) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

* * * *

(b) Whenever a transaction is proposed under subparagraph (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of

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the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: * * *."

Under this provision mergers and acquisitions and control could only be effected *at the request of the carriers* with the approval of the Interstate Commerce Commission. The Commission had no authority to compel a merger, without the consent of the carriers involved.

The Act also recognized that owners of the debtor's securities were not the only persons interested in mergers of railroads, but communities and shippers in each state had a vital interest and that was why Title 49 of the Interstate Commerce Act required notice

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of a proposed merger to be served on the Governors of the states involved.

The result is that merger, as part of a reorganization under Section 77 of the Bankruptcy Act, could under the Act of 1933 only be brought about on request of the carriers and after notice to state authorities. That point seems to have been admitted by all parties. The so called "consistency clause" in the Act of 1933 originated with Mr. Joseph B. Eastman, Chairman of the Legislative Committee of the Interstate Commerce Commission. Senator Hastings had written the Chairman of the Commission on December 20, 1932, sending him a proposed amendment to the bankruptcy law which would enlarge it to include railways, which was referred to Mr. Eastman.* On January 31, 1933, Mr. Eastman wrote Senator Hastings a letter, to which he appended suggested amendments, one of which was as follows:

"Clause (3) subdivision (b), page 26:

"(3) shall provide adequate means for the execution of the plan, which may, *so far as may be consistent with the provisions of sections 1 and 5 of the Interstate Commerce Act, as amended,* include the transfer of all or any part of the property of the debtor or another *railroad* corporation or to other *railroad* corporations or the consolidation of the properties of the debtor with those of another railroad corporation, or the merger of the debtor with any other raillroad

* This correspondence is available in a much later public document, Railroad Reorganizations—Hearing before the Special Subcommittee on Bankruptcy and Reorganization of the Committee on the Judiciary, House of Representatives—Seventy-sixth Congress, First Session, on S. 1869, Serial No. 11, Part 1 (1939), see pages 144, *et seq.*

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corporation, and the issuance, *so far as may be consistent with the provisions of section 20a of the Interstate Commerce Act, as amended,* of securities of either the debtor or any such *railroad* corporation or corporations, for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes;

"*Explanation.*—This act ought not to authorize railroad mergers or consolidations or the transfer of railroad properties or the issuance of railroad securities which are inconsistent with the applicable provisions of the Interstate Commerce Act, particularly the consolidation plan provisions. These amendments are intended to avoid that possibility."

Eastman's suggestion was adopted. His proposal was for the very purpose of providing that mergers in reorganizations in bankruptcies had to be made pursuant to the provisions of the Interstate Commerce Act which required consent of the carriers.

Were it not for the "consistency clause" the 1933 Act might have been susceptible to the interpretation that mergers could be effected under the Bankruptcy Act without consent of the carriers and without giving a hearing to the communities and people served by the lines. In foreclosures and equity receiverships it had been a common practice for holders of securities of the debtor railroad to organize entirely new railroad corporations to bid at a foreclosure sale, at which the securities of the debtor could be used to pay the bid price, and it is reasonable to think that the provision in Section 77 about transfers of

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debtor property to other corporations was merely intended to preserve that device for use in reorganizations, and the "consistency clause" was intended to limit (b) accordingly.

So when the 1933 bill was pending in the House, Representative Horr was concerned lest the consolidation provision of Clause 3 of subdivision (b) of the bill might give the Commission power to compel consolidations and he had the following interchange with Mr. Hatton Summers, in charge of the bill:

> "Mr. Horr: May I inquire whether or not, where the word 'reorganization' is used, the gentleman is of the opinion that this would encourage consolidation of railroads?
>
> Mr. Summers of Texas: They could not be consolidated in violation of the interstate commerce act.
>
> Mr. Horr: They would first have to go through that?
>
> Mr. Summers of Texas: They would first have to go through that."*

After a number of other Congressmen had expressed the fear that the legislation would increase the Commission's consolidation power, Congressman Rayburn took the floor to allay that fear. He was Chairman of the Committee on Interstate and Foreign Commerce charged with responsibility for the Interstate Commerce Act. He said:

> "Fear has been expressed that with the enactment of this bill the powers of the Interstate Commerce Commission and the courts over consoli-

* Congressional Record, Vol. 76, p. 2909.

> dations and mergers would be expanded. It is my firm conviction that this proposal in specific provisions safeguards the present consolidation and merger provisions of the interstate commerce act and gives no additional authority to the Commission or the courts in these matters."**

The same kind of assurance was given by Senator Hastings, in charge of the bill on the floor of the Senate. See Mr. Justice (in 1933 Senator) Byrnes' argument before the Commission, Tr. F. D. 13170, pp. 4998-5000.

The intention of Congress, in passing the Act of 1933, not to extend or enlarge the Interstate Commerce Act powers of the Commission over mergers and consolidation, and not to give it any compulsory power, could not have been made more clear. That was the very purpose of writing in the "consistency clause" and the very reason for which Mr. Eastman suggested to Senator Hastings that it be written in.

The Congress had always stood firmly against giving the Commission power to force mergers. In 1939 when bills to amend the Interstate Commerce Act were under consideration, Chairman Wheeler of the Senate Committee on Interstate Commerce, said:

> "I have repeatedly said that you could not get a bill to force consolidations, or to have in here a provision that the Commission should have an opportunity of carrying on investigations of the subject to try to force consolidations, and so forth. So, as far as this committee is concerned, with reference to this bill, you are just

** Congressional Record, Vol. 76, pp. 2917-2918.

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wasting our time in talking about consolidations, because that subject is out the window."*

This incident, *four years* after the 1935 amendments to the Bankruptcy Act, shows beyond cavil that the Congress understood at that time that the Commission had not had its powers over mergers enlarged in 1935.

In 1920 and in 1933 the Congress had refused to give the Interstate Commerce Commission power to compel consolidations.

Under date of January 21, 1935, Mr. Eastman, as Federal Coordinator of Transportation, issued a report (House Document 89, 74th Congress, First Session) on railroad problems. On page 42 he discusses the question of unification and merger of railroads. That discussion shows that at that time, January 1935, Mr. Eastman thought that there was no Act of Congress which enabled the Interstate Commerce Commission to order compulsory mergers, without the consent of the carriers. He discussed changes in the law to make such mergers possible, and wound up thus:

"Under present financial conditions, however, it seems unlikely that there will be immediate need for these changes in the statutory provisions relating to consolidations or other unifications of carriers, and for that reason, and in view of the extent and complexity of the other transportation legislation which is herein recommended, *these changes will not now be recommended.*" (Italics supplied.)

* Hearings on S. 1310, S. 2016, S. 1869, and S. 2089, 76th Cong. 1st Sess. 1939, p. 395.

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This report is significant on two points. One, it recognizes that the existing (1933) statutes did not authorize forced mergers; and, two, that "these changes (statutory) to allow it will not now be recommended" (p. 43).

His recommendations were numerous (p. 105) but did not include any proposal to give the Interstate Commerce Commission power to compel mergers, without consent of the carriers, or notice to the communities served.

At the Committee hearings on the bill for the 1935 amendments, Mr. Leslie Craven was a witness. Of him Mr. Eastman, the Federal Coordinator, said:

> "I shall not speak at length this morning, gentlemen, because I want most of the talking to be done by my counsel, Mr. Leslie Craven, who has made an intensive study of this matter and is much better equipped to deal with the details than I am."*

Mr. Craven said:

> "There is another provision with reference to the jurisdiction of the Commission as to sales and consolidations. I do not know that I can lay my finger on it this minute, *but it has the same provision which was in the previous act. We have not disturbed it.*
>
> The Chairman: It does not modify this power, does it?
>
> Mr. Craven: No, sir.
>
> The Chairman: Anyhow, it is in the law, and you say that it is in this bill?

* Hearings, H. R. 6249, p. 13.

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Mr. Craven: Yes.

The jurisdiction of the Commission with reference to the issuance of securities, or with reference to sales, consolidations or mergers of debtors' property, is in lines 1 to 8 on page 26."*

He referred to the "consistency clause" which in the Committee print of April 12, 1935, read "not inconsistent with the provisions and purposes of the Interstate Commerce Act as amended." That language was changed in the final enactment to read "not inconsistent with the provisions and purposes of Chapter 1 of Title 49 as on August 27, 1935, or thereafter amended" (Footnote, 11 U. S. C. A., 205f, p. 190).

We cannot find a word in the Congressional Record to suggest that the Congress intended by mere transposition of the "consistency clause" from subdivisions (b) and (e) to subdivision (f) or otherwise to alter the 1933 Act, by giving the Commission power to force mergers. On the contrary, Congress was told repeatedly that giving such a power was not recommended and was not effected by the 1935 bill.

Neither in the Interstate Commerce Commission proceedings nor in the opinion of Judge Hutcheson in the Court of Appeals is there any rational argument to explain how the mere transposition of the "consistency" clause from subdivisions (b) and (e) to subdivision (f) altered the meaning of that clause. Whatever it meant in subdivisions (b) and (e), it means in subdivision (f). Why it was transposed is not explained in the Congressional Record. It seems

* Hearings, H. R. 6249, p. 59.

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to have been merely the view of the draftsman of the bill in its final form that subdivision (f) was a more appropriate place for it.

In the opinions of Judges who have considered this case, there is mentioned as a substantial constitutional point the question whether forcing the equitable owners of the Florida East Coast to part with that property and accept securities of another railroad company in payment, instead of money, violates the Constitution. State statutes providing for fundamental change in the capital structure or in the value of the business of corporations generally provide that dissenting stockholders be paid off in money the appraised value of their shares. This Court has often said that if a case is susceptible of two solutions, one of which raises a constitutional question and the other does not, the Court will adopt the view which avoids the constitutional question. *Crowell* v. *Benson*, 285 U. S. 22, 62; *United States* v. *Rumely*, decided March 9, 1953, by this Court.

II.

The findings of the District Court that the plan is unfair and inequitable and that the bondholders were reasonably justified in rejecting it, were not "clearly erroneous" and the Court of Appeals erred in setting them aside.

The so-called "cram-down" provisions of Section 77 were added as one of the 1935 amendments. They were as follows:

"That, if the plan has not been so accepted by

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> the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e) * * *." 11 U. S. C. 205(e).

The 1933 Act had provided that a plan could not be approved by the court, unless accepted by two-thirds of each class of creditors.

In the report of Mr. Eastman, Coordinator of Transportation, issued January 1935, it was said (pp. 101-2):

> "* * * But a fair and equitable plan may be defeated if not approved by two-thirds. As the law is now drawn, it seems to be generally believed that the power lies in minorities to block any reorganization. While it is not thought desirable to dispense with the securing of consents from the creditors and shareholders, it is clear that there should be provisions whereby a court may, under some circumstances, make effective a fair and equitable plan over the dissent of minorities, under an arrangement insuring a full hearing to all of the parties concerned and an adjudication by the Commission and the court establishing the fairness of the

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plan. * * * The plan, if approved by the court, shall then be submitted to the interested creditors and shareholders. The consents of two-thirds of each class of creditors and stockholders shall bind the minorities in such classes. But, if the court shall find that the plan is fair and equitable, it may make it effective, even if not so approved.

Arbitrary compulsion of plans over the dissents of the interested classes is not intended, *nor is it believed that the courts will override strong dissents by any large number of such classes,* or by a single large class, excepting where it is established that they have no interest in the property. Rather, the purpose is to prevent the obstruction of plans which are favored by the larger classes of creditors or shareholders, but which are obstructed by minorities in the smaller classes in the attempt to secure unduly preferential treatment." (Italics supplied.)

Here there was not merely objection by minorities, in an effort to obtain preferential treatment. The plan is bitterly opposed by 99% of the first refunding bondholders. Since there is cash available to pay the first mortgage bonds in full, and the stock and unsecured claims have been found to be worthless, the opposition is by 99% of the equitable owners of the property and the only class that has any financial interest in the debtor.

It is also opposed by the organizations representing the employees of the Florida East Coast who are naturally disturbed at the proposal of the Interstate Commerce Commission to reduce operating expenses

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of the merged road by discharging 319 of the employees.

The opinion of the Court of Appeals overriding the opposition is a gross distortion of the declared purposes of the "cram-down" provision.

The provision in Rule 52(a) of the Federal Rules of Civil Procedure that findings of a trial judge shall not be set aside unless clearly erroneous has been completely ignored and brushed aside by the court below.

A discussion here of the facts revealed in Judge Strum's opinion would unduly lengthen this brief. We are content to ask this Court to read Judge Strum's opinion and compare it with the opinion of the Court of Appeals in which there is no real attempt to deal with the evidence. Judge Strum, before becoming a Federal Judge, served with distinction on the Supreme Court of Florida, and his work on the Federal bench entitles his opinions and findings to great weight, especially as he has had principal charge of this cause both in the equity receivership and the Bankruptcy.

If the amendments of 1935 are construed to grant the Commission power to propose forced mergers, the legislative history should convince anyone that Congress has been hoodwinked. If setting aside Judge Strum's findings was proper, the provisions of Rule 52(a) of the Federal Rules of Civil Procedure, as to the weight to be given findings of a trial judge, are

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a dead letter, and should be deleted from the rules as misleading the profession.

The writ should issue.

Respectfully submitted,

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